IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MRS. JUSTICE K.HEMA

THURSDAY, THE 29TH NOVEMBER 2007 / 8TH AGRAHAYANA 1929

CRL.A.No. 827 of 2004()

SC.5/1998 of ADDL. SESSIONS COURT (ADHOC), TRIVANDRUM
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APPELLANT: ACCUSED 1 AND 2
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1. RAJU S/O. SASIDHARAN, KALAMITATHIL VEEDU
MOONUMOOLA, VENKULAM DESOM, EDAVA VILLAGE.

2. PREMKUMAR @ PREMAN S/O. SUNDARESAN,
KALAMITTATHIL VEEDU, MOONUMOOLA, VENKULAM DESOM,
EDAVA VILLAGE.

BY ADV. SRI.B.RAMAN PILLAI
SRI.GEORGE PHILIP
SRI.R.ANIL
SRI.RAJU RADHAKRISHNAN
SRI.ANIL K.MOHAMMED
SRI.DELVIN JACOB MATHEWS
SRI.P.GOPAKUMARAN NAIR

RESPONDENTS: COMPLAINANT

STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM

BY PUBLIC PROSECUTOR SRI.NOBLE MATHEW

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 29/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY & K.HEMA,JJ.

Crl.A.NO.827 OF 20O4

Dated this the 29th day of November, 2007

JUDGMENT

Koshy, J.

Seven persons were charge sheeted for offences punishable under Sections 143, 147, 148, 323, 324, 114 and 212 of the Indian Penal Code and 27(1) of the Arms Act read with Section 149 IPC. Fifth accused died. Accused 3, 4, 6 and 7 were acquitted. Only accused 1 and 2 were found guilty under Sections 341 and 302 read with Section 34 IPC. First accused was also convicted under Section 27(1) of the Arms Act. Accused 1 and 2 together filed the appeal, but arguments were separately addressed for accused 1 and 2 by different advocates.

2. On 6.3.1996 one Shiju Soman was murdered at about 9.30 PM. According to prosecution, on that day at 9 AM, Shiju Soman pushed fifth accused, who is no more, on the ground that while he was in the Mini Restaurant conducted by PW5 at a place called, Moonnummoola, he quarrelled with PW5. Due to that enmity, accused 5 and 6 abetted accused 1 to 4 to kill deceased Shiju Soman, thereby accused 1 to 6 in prosecution of their common

object of causing the death of deceased Shiju Soman, on 6.3.1996 at 9.30 PM formed themselves into an unlawful assembly being armed with deadly weapons like sword and chopper at the footpath and its premises of Varkala Edava Public Road in Moonnummoola near the shop of one Prabhu. First accused asked deceased Shiju Soman whether he is a rowdy of that place and that he is controlling that place and then second accused uttered “kill him by stabbing” and first accused by taking a dangerous sword which was concealed on the back inside his shirt stabbed him on the right buttocks, thereby deceased Shiju Soman fell down and when he attempted to rise up, first accused told second accused to kill him and second accused cut him with a chopper on various parts of his body. Accused 2 and 3 stabbed him on various parts of his body, fourth accused pelted stones towards him and he succumbed to the injuries. He was taken to the Chirayinkeezh Taluk Hospital by PW1, his cousin (father's brother's son) at 10.30 PM on that day he died as a result of the fatal injuries inflicted by accused 1 to 6. It is also stated that the 7th accused, knowing fully well that the other accused murdered deceased Shiju Soman, with an intention to screen them from legal punishment, took all steps to conceal their presence by providing shelter in his house as well as in the houses of others. Accused 1 and 2 possessed and used arms like sword and

chopper without any licence and thereby accused 1 and 2 committed offences punishable under the Arms Act. PW1 went to the Varkala Police Station and lodged Exhibit P1 statement before PW20 on 6.3.1996 at 11.30 PM. PW1, who gave the first information statement to the deceased, was examined as an eye witness.

3. At the outset it was argued that the F.I statement though given and recorded immediately after the incident, without any time lag for making any manipulation, it was received in the court only on the second day, i.e., on 8th and the delay in despatching the FI statement in the court is a serious infirmity as held by the Apex Court in **Ishwar Singh v. State of U.P** (AIR 1976 SC 2423). Section 157 of the Code of Criminal Procedure obligates the police to send the report to Magistrate forthwith. But as held by the Apex Court in **Sarwan Singh v. State of Punjab** (AIR 1976 SC 2304) and **Anil Raj v. State of Bihar** (2001 Crl.L.J. 3969 at page 3979), and **State of UP v. Anil Singh** (1989 Crl.LJ 88) merely because there is delay in sending the report by police to the Magistrate, prosecution case cannot be thrown out especially when investigation started without much delay. Hence, when there is unexplained delay, prosecution evidence should be scrutinised more carefully. In this case FIR was registered immediately after the incident at

11.30 PM. Shiju Soman died only at 10.30 PM. PW1 had to reach the police station and give the FI statement. On the next day morning investigation process started by conducting inquest etc., and therefore merely because of the delay in receipt of FIR by the court, we cannot discard the prosecution case. It is not a case where any aspirations/allegations are levelled by the police officers for making a case against the accused. Further we note that PW20 who recorded the FI statement and registered the FIR was not asked any question regarding the delay. Of course, the investigating officer, PW22 stated that he has no explanation for the delay in sending the same to the court. Since the inquest was conducted early morning on the next day, we are of opinion that the delay in giving the F.I statement cannot be a ground for disbelieving the prosecution case as such. In any event, we shall consider the evidence with caution.

4. Before going into the evidence of occurrence witnesses, we shall first consider the postmortem report and the evidence of PW18 doctor. Exhibit P14 is the postmortem certificate issued by PW18 which noted 13 antemortem injuries which are as follows:

> "1) Sutured (Y shaped) incised penetraing wound, the oblique outer outer limb 3 cm long at right buttock, its upper inner end being 10 cm below the rim of hip bone at a level 7 cm outer to midline and the other almost horizontal limb 3 cm long, joining the inner border of the above at its middle.

The wound has entered the pelvic cavity and abdominal cavity by cutting through the structures of floor of pelvis, transfixed the sigmoid mesocolon and ended by making a cut 4 x 0.5 x 0.4 cm on the inner aspect of abdominal wall of left side in anterior axillary line, 5 cm below the costal margin with infiltration of blood over an area 11 x 8 cm. The wound was directed upwards forwards and to left for a depth of 21 cm.

The other limb was directed upwards forwards and to left for a depth of 9 cm to make a cut 1.5 x 0.4 x 0.8 cm on the inner aspect of front wall of abdomen just above public sumphysis across the midline. The anterior abdominal wall and root of penis was infiltrated with blood over an area 4 x 3 cm.

The intestines were smeared with thin film of blood. The pelvic cavity contained 180 gm of clothed blood.

2) Superficial incised wound 7 x 0.1 to 0.3 cm, horizontal on the back of right thigh 15.5 cm below the gluteal fold.

3) superficial incised wound 16 x 0.1 to 0.2 cm oblique on the back of right side of chest, the lower inner end being 10.5 cm below the root of neck in midline and the upper outer end 6 cm below the middle of right shoulder.

4) Superficial incised wound 12.5 x 0.1 to 0.2 cm on the back of left side of trunk, the upper inner end 7 cm to left of midline and 23 cm below level of root of neck.

5) Superficial incised wound 4.5 x 0.1 cm oblique on the back of right arm the upper outer and 3 cm above the elbow.

6) Superficial incised wound 2.5 x 0.5 cm horizontal on the outer aspect of right forearm 2 cm below the elbow.

7) Superficial incised wound 2.5 x 0.1 to 0.2 cm oblique on the back of right forearm 2 cm below the elbow.

8) Superficial incised wound 5 x 0.1 to 0.2 cm oblique on the front of left arm the upper inner end 5 cm below the top of shoulder.

9) Superficial incised wound 7.5 x 0.1 to 0.2 cm oblique on the front of right side of abdomen the upper inner end being 4 cm to right midline and 24 cm below the collar bone.

(The ends of all the above incised and incised penetrating wounds were sharply cut.)

10. Abrasion 1 x0.5 cm on the back of right arm 15 cm below the shoulder.

11. Abrasion 1 x 0.5 cm on the front of right knee.

12. Multiple small abrasions over an area 2 x 2 cm over the right cheek.

13. Multiple small abrasions over an area 2x2 cm on the right side of face 2 cm to right of midline and 1 cm above the lower margin of jaw bone."

The cause of death is shown as "penetrating injuries" sustained. PW18 stated that injury No.1 could be caused by stabbing with a weapon like MO1 and injury Nos.2 to 9 could be caused by cutting with a weapon like MO2. He further stated that injury No.1 is independently sufficient in the ordinary course of nature to cause death. He also stated that injury Nos. 10 to 13 could be caused by falling forward and those portions coming into contact with any

rough or hard object. In cross-examination main attempt of the counsel for the accused was to establish that the injuries mentioned cannot be caused by MO1 and MO2. PW14 deposed that the injuries could be caused by a weapon having sharp blade and tip pointed or sharp. He also stated that if one edge of the blade is sharp and the other is blunt, a stab injury made with that can cause one end of the wound sharp or pointed and the other will be blunt or splitted. He also stated that he did not notice any split injury. He also stated that all the incised wounds and penetrating wounds are having sharp or pointed ends. He also stated that first part of injury No.1 could be caused by upward thrust and the other part of the injury can be caused by withdrawing the weapon and that could happen while twisting the blade and that injury No.1 as a whole is by one act if thrusting the weapon and withdrawing the weapon is considered together. It was also stated that injury Nos.2 to 9 though superficial, could be caused by cutting with a weapon like MO2 and injury No.1 is independent injury. He also stated that as per Exhibit P15 chemical analysis report, there was 86.25 mg of ethyl alcohol per 100 ml blood. He also deposed that if more than 150 ml is present, then it can affect the activities of the person. He further clarified that MO1 and MO2 are weapons having one side sharp and other side blunt blade.

5. PW1, who gave FI statement is also an occurrence witness. He deposed that he came to the junction for taking dosa from 'thattukada'. Then he saw his brother Suresh Babu and his cousin Shiju Soman going to Moonnumoola junction and then deceased Shiju Soman was coming out of the restaurant. Accused 1 to 4 surrounded him. He identified them in court. He also stated that at that time second accused uttered, ' കുത്തെടാ', 'കൊല്ലടാ', 'കുത്തികൊല്ലടാ'. By that time, first accused took a sword from the hip and stabbed at the right buttocks of the deceased. Shiju Soman fell down. At that time first accused also told second accused, “ഇവനെ ശരിയാക്കട ാ”. Second accused, using chopper, inflicted cut injuries on the abdomen of the deceased. The deceased again fell down. Thereafter, accused 2 and 3 inflicted various injuries on the deceased. Fourth accused threw stones. He also got injury by throwing stones. He along with brother tried to prevent further injury to the deceased. Then, second accused brandished the chopper. Thereafter, accused 2 and 3 also inflicted injuries on the deceased. Hearing the sound, people from the locality gathered there. According to him, accused Nos. 5 and 6 were hiding. He also stated that when accused ran away, accused 5 and 6 also ran away. By the time a car was brought and the deceased was taken to the Chirayinkeezhu Government Hospital. He and PW2 accompanied

him in the same car to the hospital. At 10.30 PM he died and he immediately went to Varkala police station and given Exhibit P1 F.I statement. He also deposed that MO1 and MO2 were used by accused 1 and 2 respectively. He also stated that he saw the incident in the electric tube light in the restaurant. He also stated that he did not go to the hospital for treatment. MO3 series dresses of the deceased were also identified by him. Even though he was examined after about eight years, there is no much variation from Exhibit P1 F.I statement and the deposition, apart from minor variations which can occur if any witness deposes truthfully. According to the defence, he is an interested witness. Merely because he is a relative of the deceased, his evidence need not be discarded. But it requires deep scrutiny as held by the Apex Court in **Anil Sharma v. State of Jharkand** ((2000)1 SCC 662). It is he who accompanied the deceased along with PW2 for taking to the hospital. The incident occurred at 9.30 PM and immediately he was taken to the hospital and at 10.30 PM he died and immediately PW1 went to the Varkala Police Station and given F.I statement. There was no time for any manipulation for creating evidence. Even though seven persons were made as accused, according to the deposition and F.I. statement, it can be seen that main allegations are made against accused 1 to 3. There was some stone throwing

by fourth accused. In his deposition no allegations were made against accused Nos.5 to 7 except that accused Nos. 5 and 6 who were hiding ran away. It is true that the incident occurred at 9.30 PM and he has explained the existence of light, coming from the streetlight and from nearby restaurant. All the accused are also from the locality. They were known to each other and PW1's evidence show that he saw the occurrence very near to the place of occurrence. In fact he along with brother of deceased intervened to prevent further injuries on the deceased. Deceased received several injuries also. When number of persons inflicted injury in the night, it may not be possible to say exactly the place of injury inflicted and weapon used by each with precision especially after a period of eight years. But we can only say, on going through the evidence, that there is no substantial difference between the F.I statement and the evidence given in the court and generally his evidence is acceptable, even though improvements and omissions made by them can be discarded.

6. Now we will come to the evidence of PW2. PW2 is an independent witness. It is argued by learned counsel for the appellant that in the FI statement it is not stated that PW2 has seen the incident. But in the F.I statement itself it is stated that he along with PW2 has taken the deceased to the hospital. It is not necessary

that names of all the witnesses should be mentioned in the F.I statement and the F.I statement is not an encyclopedia of all the events. Only main aspects of crime are usually recorded by the police even if the information was given in very detail. Non-mentioning of the names of PW2 as an eye witness in FI statement by itself cannot impair his evidence as held by the Apex Court in **Satnam Singh v. State of Rajastan** (2000)1 SCC 662). In this case, the name of PW2 mentioned therein along with persons who accompanied PW1 while taking the deceased to the hospital. PW2 deposed that he came there to see a movie in Swapna Theatre at Moonnumoolayil and then he saw accused 1 to 3 and 6 standing around the deceased. He identified the above accused. He also stated that second accused asked first accused to stab the deceased and the first accused immediately took a sword from his hip and stabbed at the buttocks of the deceased. Thereafter, first accused told second accused to kill him. Second accused also imposed a cut injury on the abdomen of the deceased. The deceased fell down. Fourth accused threw stones. He also stated PW1 also sustained injuries due to the throwing of stones. He further stated that he, along with PW1, went and brought a vehicle of one Vijayan, PW6. He also stated that in the electric post there was tube light and he saw the incident. But he did not say any act done by accused Nos.3

and 6 except their presence at the place of occurrence. On going through the evidence, we are of opinion that there is no much difference between the evidence of PW1 and PW2. He identified the accused and he also stated that first accused inflicted fatal injury on the right buttocks of the deceased after second accused instigated him to inflict a stab injury and second accused also used chopper to inflict other cut injuries. As regards the role of accused 1 and 2 is concerned, there is no much difference with the previous statement etc. There is no reason for PW2 to give false evidence to implicate accused 1 and 2. PW3 is a driver and he knew both the accused and the deceased. He stated that while he was returning home, he heard sounds of a commotion from the restaurant and he saw PW5, restaurant owner and the deceased talking. He also saw accused 1 and 2 there. After talking he again heard the commotion near the shop of Prabhu Pillai. He returned and he saw accused Nos.1, 2 and 6 running and first accused was having sword with him. When he went near the shop, he saw Shiju Soman lying injured and by the time a car came and brother-in-law of Shiju Soman, PW1, PW2, Suresh Babu etc. took Shiju Soman into the car. He also stated that there was light and he was able to see the incident. He also identified the third accused. PW3 is also an independent witness. He also corroborated the evidence of PW1 and PW2. It is argued

that the names of Suresh Babu and Jayan were mentioned as witnesses in the FI statement. But, on further enquiry, Jayan was made as 6th accused by the police. At the time of FI statement, PW1 only noted the presence of 6th accused. Pws 1 to 3 are eye witnesses. It is vehemently argued that name of Suresh Babu was mentioned in the FI statement. He was with the deceased from the very beginning of the incident. Deceased went with him to the residence. There is no explanation by the prosecution why Suresh Babu was not examined. If he was examined, there would have been good evidence regarding the injuries inflicted on the road side near Prabhu's shop and genesis of the incident. Three eye witnesses were examined and there is no material to disbelieve their evidence except the genesis of the incident. The evidence of Pws 1, 2 and 3 are supported by recovery of weapons, MO1 and MO2, on the basis of the confession statement made by accused 1 and 2. It is argued that there is no authorship of concealment. In **Dual Nath Pandey v. State of UP** ((1981) 2 SCC 166), **Jaffer Hussain v. State of Maharashtra** (AIR 1990 SC 1934) held that authorship of concealment is admitted, recovery of the weapon cannot be admissible under section 27 of the Evidence Act. But, such recovery proves that accused knew the place where the weapon used for the offence are concealed. (See: **State of Maharashtra v.**

Suresh ((2000) SCC (Crl.) 263). Ext.P12 is the scene mahazar of sword recovered at the disclosure statement of A1. Ext.P19 is the seizure mahazar of chopper recovered at the instance of A2. Ext.P21 series FSL report showed that MO1 sword contained human blood and MO2 chopper contained blood stains though insufficient to detail the origin of the blood. Item No.1 in Exhibit P21 series is pants and item No.2 is half sleeve shirt. Item Nos.1 and 2 were the pants and shirt worn by deceased Shiju Soman at the time of occurrence and they were seized while preparing Exhibit P13 inquest report. In Exhibit P21 series it is stated that on examination of item No.1 pants, a 'T' shaped severance was found on the back side portion just above the opening of the back right side pocket, that the maximum length of this severance was 3.5 cms., that on microscopic examination this severance was found having cut edges, that on examination of the shirt in item No.2 a linear severance was found at the bottom right side portion of the back flap of the shirt and on microscopic examination this severance was found having cut edges. In Exhibit P21 series it is stated that the cut marks found in the pants in item No.1 and the shirt in item No.2 can be caused by sharp edged weapon similar to the sword in item No.3. So according to prosecution, Exhibit P21 series would also support the prosecution case that it is by using

Mos 1 and 2 A1 and 2 inflicted injuries to deceased Shiju Soman by A1 stabbing him on the right buttocks with MO1 and by A2 cutting him on the various parts of his body with MO2.

7. PW5, owner of the mini restaurant where the problem started deposed that nothing occurred in his shop. He also stated that there was an order to close the shops by 8 PM. But the fact admitted by him is that he closed the shop only at 8.30 PM. No notification or order requiring shops to be closed by 8 PM was produced. But the Village Officer has stated at the time of inspection in July, which is three months after the incident, that there was such an order. PW5 was not running a shop, but he was running a restaurant. The main incident happened, according to the prosecution, after deceased came out of the shop which is at Moonnumoola junction. A shop and a theatre were running nearby, even though in the plan only an electric post was noted. It was argued that it was not specifically noted that a tube light was there on the post. But, we are of the opinion that in view of the fact that it was a junction where cinema theater and restaurant were functioning and there was road traffic and witnesses, deceased and accused were all known to each other and there is no difficulty for identification of A1 and A2.

8. Now we will come to the defence of accused on 313

statement. The defence of the accused in 313 statement was that father of Shiju was conducting an Ayurveda Pharmacy and he was also selling illicit liquor and the accused objected the same one or two times and on that basis they were inimical and the case was foisted against them when somebody inflicted fatal injuries on shoulder and they denied all the incriminating circumstances in it. No defence evidence was adduced. On going through the evidence, we are of the opinion that evidence deposed show that accused Nos.1 and 2 used dangerous weapons. But, at the same time, evidence of Pws 1, 2 and 3 shows that they did not see the origin of the incident and looked into the place hearing the sounds of commotion. Either they were there in the beginning of the incident and deceased, PWs 1, 2, 3 and 5 and brother of PW1 picked up quarrel with the accused and they are suppressing that part or Pws 1 to 3 came to the place of incident after fight started. Non-examination of the brother of PW1 who was with the deceased throughout as per the evidence of PW1 and whose name was mentioned in the F.I. statement as a witness to the incident also shows that prosecution evidence is not sufficient to prove the origin of incident. The nature of injuries also shows that only one incised wound was inflicted. Others were superficial injuries as stated by the doctor and it can be caused during a fight. But, those injuries

together are serious in nature as deposed by doctor. Injury Nos.3 and 4 are also grave in nature. This is further supported by the fact that at three places, including starting from the restaurant, there were blood stains showed the evidence of fight. Accused Nos.1 and 2 together have inflicted the injuries. It is true that when murderous assault took place where several persons were involved, that was in the night, it is difficult to say with precision, who inflicted the injuries. As held by the Apex Court in **Harshadsingh Pahelvansingh Thakore v. State of Gujarat** ((1976) 4 SCC 640) Observed as follows:

> "... when a murderous assault by many hands with many knives has ended fatally, it is legally impermissible to dissect the serious ones from the others and seek to salvage those whose stabs have not proved fatal. When people play with knives and lives, the circumstances that one man's stab falls on a less or more vulnerable part of the person of the victim is of no consequence to fix the guilt for murder. Conjoint complicity is the inevitable inference when a gory group animated by lethal intent accomplish their purpose cumulatively. Section 34 IPC fixing constructive liability conclusively silences such a refined plea of extrication. (See: **Amir Hussain v. State of UP** ((1975) 4 SCC 247) and **Maina Singh v. State of Rajasthan** ((19.76) 2 SCC 827)."

We are of the opinion that fatal injuries were caused in a fight which started in the place of PW5 when deceased and his brother quarelled with PW5 and incident occurred on the spur of the moment in a sudden fight. Considering the nature of the injuries

and the area where the injuries were inflicted, we are of the view that those injuries were inflicted with the knowledge that it is likely to cause death, but without an intention to cause death in a sudden fight occurred between the two groups. Since the genesis of the incident was not brought out and on the facts of this case, they can be convicted only under Section 304 Part II read with Section 34 IPC and the conviction and sentence passed under Section 302 are set aside. Even without the aid of section 34, they are liable to be convicted under section 304 Part II as both A1 and A2 used dangerous weapons and caused injuries. They are convicted under Section 304 Part II IPC and sentenced for imprisonment for seven years and they are entitled to right of set off. Since there is already a direction that the sentence can run concurrently and the first accused was convicted for offence under the Arms Act only for three years and he has already undergone that sentence, that aspect was not argued seriously and we are not going into the contentions on sentencing A1 under the Arms Act.

The appeal is allowed to the above extent.

J.B.KOSHY, JUDGE

K.HEMA, JUDGE

vgs.